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Administrative Interpretation No. 3.601-7918

PARTIES MAY AGREE IN WRITING THAT CERTAIN LOANS SECURED BY AN INTEREST IN LAND BE SUBJECT TO CONSUMER PROTECTION CODE INCLUDING MAXIMUM 12% ANNUAL PERCENTAGE RATE.

You have asked what effect, if any, Acts 7 and 19 of 1979 have on Consumer Protection Code Section 3.601 [S. C. Code Ann. §37-3-601 (Cum. Supp. 1979)]. That section provides:

Except in the case of a loan primarily secured by a first lien which is a purchase money security interest in land, the parties to a loan other than a consumer loan may agree in a writing signed by the parties that the loan is subject to the provisions of this title applying to consumer loans. If the parties so agree, the loan is a consumer loan for all purposes of this title except for purposes of loan finance charges for supervised loans (§37-3-508) and supervised loans pursuant to a lender credit card (§37-3-515). (Emphasis added)

Act 7 of 1979, Section 7, amended South Carolina Code Section 34-31-30 by deleting the second proviso concerning first mortgage real estate loans and provided in Section 1 that the parties to a loan secured by a first mortgage on real estate may until and including June 30, 1981 contract for any rate of interest with certain exceptions. At the same time, Section 6 of Act 7 of 1979 suspended subsection (2) from the definition of "consumer loan" in Consumer Protection Code Section 3.104 [S. C. Code Ann. §37-3-104 (Cum. Supp. 1979)] and the reference to it in subsection (1) until June 30, 1981. The suspended language of Section 3.104 reads as follows:

"Consumer loan" does not include a loan primarily secured by a first lien which is a purchase money security interest in land. (Emphasis added)

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The suspended subsection includes the exact language found in Section 3.601 quoted above (underlined in both), but Section 3.601 was not specifically amended by Act 7 of 1979 by suspending that language as was Section 3.104. The original purpose of the exception to Section 3.601 which includes the underlined language was apparently to prevent lenders from taking advantage of the higher maximum rate of finance charge allowed by the Consumer Protection Code as then compared to South Carolina Code Section 34-31-30's second proviso, by getting the borrower to sign an agreement that a first mortgage purchase money home loan (or other first mortgage loan governed by §34-31-30's second proviso) be subject to the Consumer Protection Code. Now that there is no rate ceiling for certain first mortgage real estate loans while Section 3.601 provides a 12% annual percentage rate ceiling for loans brought under the Consumer Protection Code, the reason for the exception in Section 3.601 no longer exists. When the General Assembly deleted the exception from Section 3.104 but did not specifically do so in Section 3.601, we do not believe it intended to prevent the parties to a loan primarily secured by a first lien purchase money security interest in land from bringing that transaction under the Consumer Protection Code providing a ceiling on finance charges as well as additional consumer protections if the parties so desire. It is the opinion of this Department that Section 3.601 of the Consumer Protection Code may be read as if the language "except in the case of a loan primarily secured by a first lien which is a purchase money security interest in land" were suspended until June 30, 1981 to keep that section in harmony with Section 3.104, the amended definition of consumer loan.

Act 7 of 1979 as amended by Act 19 of 1979 further amended the Consumer Protection Code by adding a new subsection to Section 1.202 [S. C. Code Ann. §37-1-202 (Cum. Supp. 1979)], the exclusionary section, as follows:

[This title does not apply to:]

- (11) First mortgage loans made to enable the debtor to build or purchase a residence, when made by a lender whose loans are subject to supervision by an agency of this State or of the United States or made by a Federal Housing Administration approved mortgagee or made by a lender who is a person other than an organization who makes not more than five consumer loans in a single calendar year.

While such first mortgage loans meeting the definition of consumer loan are excluded from otherwise automatic coverage of the Consumer Protection Code, we do not believe the General Assembly intended to prevent the parties to such a loan from agreeing to be bound by the Consumer Protection Code if they so desire, including the maximum 12% annual percentage rate (except when rates are governed by other law, e.g., Federal Housing Administration insured or Veterans Administration guaranteed loans). A written agreement that the transaction be subject to the Consumer Protection Code provides certainty as to what law applies when it is unclear whether the transaction is in fact excluded from the Consumer Protection Code by Section 1.202(11). To illustrate, a lender may be unsure that he is the type of lender whose first mortgage loans to build or purchase a residence are excluded by subsection (11). Likewise, it may not be clear to a legal certainty that the purpose of the first mortgage loan is to "build or purchase a residence."

Consumer Protection Code Section 3.601 is based on Section 3.601 of the Official 1968 Text of the Uniform Consumer Credit Code [UCCC]. The difference from the uniform language is the addition of two exceptions concerning certain first lien transactions and supervised loan rates. The official comment to UCCC Section 3.601 refers to the official comment to Section 2.601, the parallel section for sales. That comment says in part:

Since the right to charge a given rate may depend on whether the purpose of the [transaction] is personal or business ..., the creditor takes a risk whenever he makes a charge for credit. This section permits creditors, by inserting an appropriate clause in a ... contract, to be certain that the transaction is a consumer credit [transaction] for the purposes of this Act. If the creditor is willing to subject himself to all the restrictions of the Act, there is no reason why he should not be able to make the same charges to any [person] as those he can make to one who [borrows] for a consumer purpose.

Likewise, we see no reason or legislative intention to prevent the parties to a loan from bringing a transaction under the Consumer Protection Code, whether to clear up any uncertainty as to what law applies (e.g., to clarify that the parties agree that the Code governs although it may qualify for exclusion under §1.202(11)) or to provide a balance between what may be a higher maximum rate than otherwise might apply and more protection for the borrower (e.g., a business purpose loan).

Finally, you asked about the effect, if any, of Acts 7 and 19 of 1979 on a non-consumer loan secured by a second mortgage on real estate. Consumer Protection Code Section 3.601 allows the parties to such a transaction to bring it under the Consumer Protection Code by written agreement with the result that the loan is limited to a maximum 12% annual percentage rate as well as being subject to other applicable consumer protections. Acts 7 and 19 have no effect on non-consumer second mortgage loans and thus in our opinion they may be brought under the Consumer Protection Code and if so are subject to a 12% annual percentage rate ceiling as before.

In summary, in our opinion Consumer Protection Code Section 3.601 may be read as if the exception concerning loans primarily secured by a first lien which is a purchase money security interest in land were suspended until June 30, 1981. Further, certain mortgage loans, first or otherwise, may be brought under the Consumer Protection Code subjecting them to a 12% annual percentage rate ceiling. This opinion does not alter Administrative Interpretation No. 1.202-7901 issued January 31, 1979 concerning agricultural purpose loans. Such loans may not be brought under the Consumer Protection Code because of the apparent legislative intent to prevent that result.

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